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Supreme Court of the United States

OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS. and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent N. V. Nederl. Amerik Stoomv. Maats. hereby petitions this Court for a rehearing of the decision of this Court in this matter dated December 13, 1965, or in the alternative, for a modification of said decision for the reasons set forth below:

I

By this Court's decision reversing the judgment of the Court of Appeals in this case and reinstating the District Court's judgment in favor of Albanese, this Court has summarily and without plenary consideration in effect reversed a long line of decisions of the Court of Appeals for the Second Circuit which have heretofore been approved by this Court.

The Court of Appeals specifically set aside the judgment and remanded the case to the District Court for retrial of plaintiff's case because the District Court had charged the jury that it could find against the defendant on the basis of negligence "even if it did not have actual knowl-

edge of an unsafe condition in the hold, if the jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury." The Court of Appeals reasoned that: "This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist." (Petition of Albanese, App. B, p. 23, 346 F. 2d 481, 483). The Court of Appeals cited in support of this reasoning, *Berti* v. *Compagnie de Navigation,* 213 F. 2d 397, and *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, cert. den. 359 U. S. 927. The decision of the Court of Appeals in this respect is consistent with and was required by a long line of decisions in the Second Circuit running back for more than a decade, which this Court has repeatedly refused to review, including *Gallagher* v. *United States Lines,* 206 F. 2d 177, cert. den. 346 U. S. 897, reh. den. 346 U. S. 940; *Oblatore* v. *United States,* 289 F. 2d 400, 402; *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752, 753, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917; *Forkin* v. *Furness, Withey & Co.,* 323 F. 2d 638, 640.

This Court gave approval to these decisions of the Second Circuit by citing *Filipek* v. *Moore-McCormack Lines, Inc., supra,* as indicative of the rule applied by the Courts of Appeal in *West* v. *United States,* 361 U. S. 118 at page 123, where this Court itself announced an identical rule. In *West* (361 U. S. at p. 124), this Court specifically distinguished the rule there announced from the contrary rule enunciated by it in *Halecki* v. *United N.Y. and N.J. Pilots Assn.,* 358 U. S. 613, where the shipowner *required* the contractor to employ a highly dangerous instrumentality.

When this Court in its decision herein stated "that the judgment of the Court of Appeals setting aside the judg-

ment for petitioner Albanese on the grounds that the trial court incorrectly charged the jury on the issue of negligence is erroneous''; this Court in effect held that a shipowner may be held liable in negligence for its failure to ''actively supervise the stevedore's work'' and ''take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist.'' If that was the intent of the Court in the present case, the present decision summarily, without plenary consideration, reverses the rule of decision of the above cited cases heretofore specifically approved by this Court in *West*.

Whether or not there may have been within the context of this case a sound basis for holding the shipowner liable for negligence, the fact remains that the basis of the Circuit Court's setting aside the judgment and remanding the case for a new trial, was the charge of the trial court in allowing the defendant shipowner to be held liable for constructive notice of an unsafe condition created in the hold by the use by the stevedore of a hilo. It is respectfully submitted that this Court's summary reversal of the Court of Appeals in that respect will at least lead to doubt and confusion as to the applicability of the rule of decision enunciated in the foregoing cited cases and heretofore approved by this Court in *West*, and that for this reason a rehearing should be granted so that plenary consideration of this issue can be had.

II

In reinstating the judgment of the District Court in favor of Albanese, this Court has precluded petitioner from having a determination by the Court of Appeals of the question raised by it in that Court of the excessiveness of the verdict in this case.

On its appeal to the Court of Appeals in this case, petitioner as appellant in that Court, raised the contention that the verdict of the jury in this case was excessive. Petitioner

argued the point to considerable extent, pointing to circumstances at the trial which tended to create a gross exaggeration of the effect of the injuries in the minds of the jurors. This point was not passed upon by the Court of Appeals as obviously it became moot in view of the decision of the Court of Appeals setting aside plaintiff's judgment and remanding the case to the District Court for a new trial. Now that this Court has determined that plaintiff is entitled to a judgment in his favor, by reinstating the judgment of the District Court, this Court has precluded petitioner from having consideration by the Court of Appeals of the question of the excessiveness of the verdict.

This is a real and serious question in this case. Without going into the merits of the contention more extensively than would be here justified, petitioner would point out that plaintiff was at the time of his accident a 51-year-old man who was previously impaired by a hearing loss not related to the accident (61a, 121a, 113a, 116a-120a).* He was confined to the hospital for 47 days (121a-122a) and was discharged with a final diagnosis of carbon monoxide poisoning accompanied by cerebral edema and hyperemia (112a). He remained under intermittent medical treatment until May 1963 (122a-123a). The accident occurred in February 1961. There was evidence of blacking out on July 24, 1961 when plaintiff was working over a barbecue pit which caused him to sustain burns on his right hand (87a, 122a-123a). His medical expenses amounted to approximately $3,000.00 (189a). His highest rate of earnings prior to the accident amounted to approximately $8,000.00 a year (125a). There was medical opinion that, based upon a continuance of his subjective complaints, he was permanently disabled from doing the kind of work he had previously done, but no suggestion whatever that he

* All the references in this point are to the Appendix to Defendant-Appellant's Brief in the Court of Appeals.

was entirely incapable of doing any other kind of work (96a, 110a, 111a).

In summation plaintiff's counsel referred to the plaintiff as a man who had a burden "to become a vegetable for the rest of his life" (273a), and in fact pleaded to the jury to penalize the defendant to prevent recurring injuries to longshoremen required, as plaintiff's counsel put it, to go "down into the black hole of Calcutta and barely come out with his life" (272a). Counsel's inordinate and exaggerated statements were given further emphasis by the Trial Court in the charge to the jury that plaintiff's claim was that he was converted from "a fairly vibrant life of activity into the energyless status of mere existence, forever incapable of doing a day's work, sick and frustrated by reason of various forms of disability which will persist for the remainder of his life and which were induced and aggravated by the accident" (22a) and again, later in the charge: "* * * that the proof warrants your finding that he is now and always will be slumping through life, that in his case there are no compensatory physical functions upon which he can rely so that life can have meaning for him" (25a). No such description of plaintiff's injuries or consequences of the accident was justified by the evidence. Exception was duly taken (37a).

A verdict of $145,000.00 in this case, it is respectfully submitted, is so shocking that to preclude petitioner from consideration of the question of excessiveness by the Court of Appeals, which is the effect of this Court's decision, would constitute a serious miscarriage of justice. That a retrial may be ordered on the sole issue of damages now appears to be well-settled. *Mason* v. *Mathiasen Tanker Industries, Inc.*, 298 F. 2d 28, cert. den. 371 U. S. 828; *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; Rule 59(a) F.R.C.P., 28 U.S.C.

III

In view of the reinstatement of the judgment in favor of Albanese, petitioner should be granted an opportunity to have considered by the Court of Appeals the question raised by it in its appeal to the Court of Appeals, that it was entitled to a directed verdict in its favor against third-party defendant which, because of the decision of the Court of Appeals on the main case, became moot.

In the Court of Appeals petitioner had argued that it was entitled to a directed verdict of indemnity against third-party defendant. In view of the fact that the Court of Appeals had reversed the judgment in favor of plaintiff and remanded the case to the District Court for retrial, judgment in favor of petitioner under its third-party complaint could not be directed, even though petitioner had preserved its right to such a judgment by moving for judgment n.o.v. against third-party defendant in the District Court. The question of indemnity upon retrial would necessarily have to be determined within the context of the proof presented upon the retrial. *Fatovic* v. *Nederlandsche-Ameridaansche Stoomvaart, Maatschlappij* (CA2), 275 F. 2d 188, 191; *Bordas & Company* v. *Pizzaro Serrano* (CA 1), 314 F. 2d 291.

Now that this Court has reinstated plaintiff's judgment, petitioner's right to a directed verdict of indemnity against third-party defendant, International Terminal Operating Co., Inc., must be determined within the context of the present record. The Court of Appeals has held that the conversation of the two longshoremen with the ship's officer requesting him to put on the blowers and his failure to do so would not constitute conduct on the part of the shipowner sufficient to preclude petitioner from indemnity (Opinion of Court of Appeals, Appendix B to Petition of Albanese, pp. 25-26, 346 F. 2d 481, 484). This Court has

denied the petition for certiorari of International Terminal Operating Co. claiming error of the Court of Appeals in this respect. This was the only disputed issue in this case on the question of indemnity.

In the present case there is no conflict whatever in the proof that the stevedore owned and supplied the hilos; that it had control over both the hilos and the longshoremen who worked in the hold; that it had knowledge of all of the conditions of the work area that would affect conditions down in the hold, namely, that the after half of the upper 'tween deck was closed, that there was a rain tent over the hold and that the ship's blowers were not in operation; that it maintained portable blowers for use in exhausting hilo fumes from the hold and instruments for testing the contents of carbon monoxide in the hold; that no request had been made by anyone to put the ship's blowers in operation until about 15 minutes prior to plaintiff's injury when the request was made to a ship's officer; that the longshoremen in the lower hold had been working continuously in that hold with a hilo in operation since about 8 o'clock in the morning; that a second gang of longshoremen was sent into the after part of the 'tween deck where another hilo was put in operation by the stevedore at about 10:45 A. M. without any request having been made to the ship to put its blowers in operation and without any blowers being placed in the hold by the stevedore; that the request to a ship's officer to turn on the ship's blowers was not made until 10 or 15 minutes thereafter. Since the Court of Appeals has held that this would not be sufficient to absolve the stevedore from its obligation to indemnify the shipowner, it would appear that there is no question for retrial on the issue of indemnity if the judgment in favor of the plaintiff is sustained.

In the interest of judicial economy and to avoid what might well prove to be a needless retrial of the case as

between third-party plaintiff and third-party defendant, it is submitted that this case should be remanded to the Court of Appeals to enable it to determine whether, within the context of the proof in this case, petitioner and third-party plaintiff is entitled to a directed verdict in its favor against International Terminal Operating Co., Inc., third-party defendant. The relief herein sought is consistent with the action taken by this Court in *Palermo* v. *Luckenbach Steamship Company,* 355 U. S. 910.

WHEREFORE, petitioner prays for a rehearing of the decision in this matter rendered by this Court on December 13, 1965 or, in the alternative, for a modification of said decision, striking therefrom the provision for reinstatement of the judgment of the District Court in favor of the plaintiff Albanese and remanding the case to the Court of Appeals for the Second Circuit for further consideration in accordance with this Court's decision herein.

Dated: New York, New York
December 30, 1965.

Respectfully submitted,

N.V. Nederland Amerik Stoomv. Maats.

By .....
EDMUND F. LAMB
Attorney for Respondent

Certificate of Counsel

I certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

.....
EDMUND F. LAMB
Counsel

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